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7 SCOTT T.,
8 Plaintiff,
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10 v.
11 ANDREW SAUL,
12 Defendant.

Case No. 19-cv-06875-DMR

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17 **ORDER ON CROSS MOTIONS FOR
SUMMARY JUDGMENT**

18 Re: Dkt. Nos. 20, 23

19 Plaintiff Scott T. moves for summary judgment to reverse the Commissioner of the Social
20 Security Administration's (the "Commissioner's") partially unfavorable final administrative
21 decision, which denied Plaintiff's application for benefits under Title II of the Social Security Act,
22 42 U.S.C. § 401 *et seq.* [Docket Nos. 20 ("Pltf. Mot."), 24 ("Reply").] The Commissioner cross-
23 moves to affirm. [Docket No. 23 ("Def. Mot.").] For the reasons stated below, the court denies
24 Plaintiff's motion and grants the Commissioner's cross-motion.

25 **I. PROCEDURAL HISTORY**

26 Plaintiff filed applications for Social Security Disability Insurance ("SSDI") and
27 Supplemental Security Income ("SSI") benefits on June 10, 2013, which were initially denied on
December 20, 2013 and again on reconsideration on March 17, 2014. Administrative Record
("A.R.") 117-40, 143-164, 354-56, 357-62. After a hearing, an Administrative Law Judge ("ALJ")
issued an unfavorable decision dated September 16, 2015. A.R. 165-82. The Appeals Council
reviewed the decision and remanded the matter for further proceedings. A.R. 183-86. A second
ALJ held another hearing on December 19, 2017 and issued a partially favorable decision on August
23, 2018. A.R. 13-41. Specifically, the ALJ awarded SSI benefits beginning May 31, 2018 but
denied Plaintiff's application for SSDI benefits. A.R. 13-41.

28 The ALJ determined that Plaintiff has had the following severe impairments since

1 November 11, 2011: osteoarthritis of left ankle, status post-total hip arthroplasty, multi-level lumbar
2 spondylosis with left L5 radiculopathy, and chronic pain syndrome. A.R. 21. The ALJ found that
3 since the onset date, Plaintiff retains the following residual functional capacity (RFC):

4 [T]o perform light work as defined in 20 CFR 404.1567(b) and
5 416.967(b) where the individual is able to frequently lift and carry 10
6 pounds, and occasionally lift and carry 20 pounds; sit for up to 6 hours
7 (2 hours at a time), and stand and walk 4 hours in an 8-hour workday
8 with normal breaks. The individual has the following additional
9 limitations: should never climb ladders, ropes or scaffolds; able to
10 occasionally climb ramps and stairs; and can occasionally stoop,
11 kneel, balance, crouch and crawl.

12 A.R. 23. Relying on the opinion of a vocational expert (“V.E.”) who testified that an individual
13 with such an RFC could perform other jobs existing in the economy, including working as an office
14 helper, hand packer, or small products assembler, the ALJ concluded that Plaintiff was not disabled
15 prior to May 31, 2018. A.R. 19. However, on May 31, 2018, Plaintiff became disabled due to his
16 advanced age. A.R. 29, 31.

17 The Appeals Council denied Plaintiff’s request for review on September 5, 2019. A.R. 1-6.
18 Plaintiff sought review in this court pursuant to 42 U.S.C. § 405(g).

19 **II. STANDARD OF REVIEW**

20 Pursuant to 42 U.S.C. § 405(g), this court has the authority to review a decision by the
21 Commissioner denying a claimant disability benefits. “This court may set aside the Commissioner’s
22 denial of disability insurance benefits when the ALJ’s findings are based on legal error or are not
23 supported by substantial evidence in the record as a whole.” *Tackett v. Apfel*, 180 F.3d 1094, 1097
24 (9th Cir. 1999) (citations omitted). Substantial evidence is evidence within the record that could
25 lead a reasonable mind to accept a conclusion regarding disability status. *See Richardson v. Perales*,
26 402 U.S. 389, 401 (1971). It is more than a mere scintilla, but less than a preponderance. *See Saelee*
27 v. *Chater*, 94 F.3d 520, 522 (9th Cir.1996) (internal citation omitted). When performing this
28 analysis, the court must “consider the entire record as a whole and may not affirm simply by isolating
a specific quantum of supporting evidence.” *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 882 (9th
Cir. 2006) (citation and quotation marks omitted).

If the evidence reasonably could support two conclusions, the court “may not substitute its

1 judgment for that of the Commissioner” and must affirm the decision. *Jamerson v. Chater*, 112
2 F.3d 1064, 1066 (9th Cir. 1997) (citation omitted). “Finally, the court will not reverse an ALJ’s
3 decision for harmless error, which exists when it is clear from the record that the ALJ’s error was
4 inconsequential to the ultimate nondisability determination.” *Tommasetti v. Astrue*, 533 F.3d 1035,
5 1038 (9th Cir. 2008) (citations and internal quotation marks omitted).

6 The court has read and considered the entire record. For the purposes of brevity, the court
7 cites only the facts that are relevant to its decision.

8 **III. DISCUSSION**

9 Plaintiff argues that the ALJ erred in evaluating the opinion of Plaintiff’s treating surgeon,
10 Dr. Semon Bader and the opinion of Plaintiff’s treating physician, Dr. Smriti Shrestha.

11 **A. Legal Standard for Weighing Medical Opinions**

12 Courts employ a hierarchy of deference to medical opinions based on the relation of the
13 doctor to the patient. Namely, courts distinguish between three types of physicians: those who treat
14 the claimant (“treating physicians”) and two categories of “nontreating physicians,” those who
15 examine but do not treat the claimant (“examining physicians”) and those who neither examine nor
16 treat the claimant (“non-examining physicians”). *See Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
17 1995). A treating physician’s opinion is entitled to more weight than an examining physician’s
18 opinion, and an examining physician’s opinion is entitled to more weight than a non-examining
19 physician’s opinion. *Id.*

20 The Social Security Act tasks the ALJ with determining credibility of medical testimony and
21 resolving conflicting evidence and ambiguities. *Reddick*, 157 F.3d at 722. A treating physician’s
22 opinion, while entitled to more weight, is not necessarily conclusive. *Magallanes v. Bowen*, 881
23 F.2d 747, 751 (9th Cir. 1989) (citation omitted). To reject the opinion of an uncontradicted treating
24 physician, an ALJ must provide “clear and convincing reasons.” *Lester*, 81 F.3d at 830; *see, e.g.*,
25 *Roberts v. Shalala*, 66 F.3d 179, 184 (9th Cir. 1995) (affirming rejection of examining
26 psychologist’s functional assessment which conflicted with his own written report and test results);
27 *see also* 20 C.F.R. § 416.927(d)(2); SSR 96-2p, 1996 WL 374188 (July 2, 1996). If another doctor
28 contradicts a treating physician, the ALJ must provide “specific and legitimate reasons” supported

1 by substantial evidence to discount the treating physician's opinion. *Lester*, 81 F.3d at 830. The
2 ALJ meets this burden "by setting out a detailed and thorough summary of the facts and conflicting
3 clinical evidence, stating his interpretation thereof, and making findings." *Reddick*, 157 F.3d at 725
4 (citation omitted). "[B]road and vague" reasons do not suffice. *McAllister v. Sullivan*, 888 F.2d
5 599, 602 (9th Cir. 1989). This same standard applies to the rejection of an examining physician's
6 opinion as well. *Lester*, 81 F.3d at 830-31. A non-examining physician's opinion alone cannot
7 constitute substantial evidence to reject the opinion of an examining or treating physician, *Pitzer v.*
8 *Sullivan*, 908 F.2d 502, 506 n.4 (9th Cir. 1990); *Gallant v. Heckler*, 753 F.2d 1450, 1456 (9th Cir.
9 1984), though a non-examining physician's opinion may be persuasive when supported by other
10 factors. See *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001) (noting that opinion by
11 "non-examining medical expert . . . may constitute substantial evidence when it is consistent with
12 other independent evidence in the record"); *Magallanes*, 881 F.2d at 751-55 (upholding rejection of
13 treating physician's opinion given contradictory laboratory test results, reports from examining
14 physicians, and testimony from claimant). An ALJ "may reject the opinion of a non-examining
15 physician by reference to specific evidence in the medical record." *Sousa v. Callahan*, 143 F.3d
16 1240, 1244 (9th Cir. 1998). An opinion that is more consistent with the record as a whole generally
17 carries more persuasiveness. See 20 C.F.R. § 416.927(c)(4).

18 B. Analysis

19 1. Semon Bader, M.D.

20 Dr. Bader performed surgery on Plaintiff's left ankle on November 26, 2012 and met with
21 Plaintiff for follow-up examinations several times after the surgery. A.R. 641. About two weeks
22 post-op, Plaintiff appeared well and performed range of motion exercises without pain. A.R. 642.
23 On January 13, 2013, Plaintiff reported no post-op problems and stated that his pain was controlled
24 with analgesics. A.R. 642. His motor function was grossly normal and his ankle was fully weight-
25 bearing. A.R. 642-43. On April 24, 2013, Plaintiff told Dr. Bader that he was feeling better but his
26 ankle was still sore. A.R. 643. Dr. Bader noted that Plaintiff's motion was non-irritable and that he
27 could move his toes without pain. A.R. 643. Plaintiff's motion function was 5/5. A.R. 643. Dr.
28 Bader followed up with Plaintiff again on August 22, 2013. A.R. 1109. During that meeting,

1 Plaintiff reported pain in his left ankle joint and foot. A.R. 1109. He also stated that he sometimes
2 feels tingling on the top of his foot. A.R. 1109. On examination, Plaintiff appeared well, although
3 the range of motion in his left ankle was diminished and he had some tenderness along the joint line.
4 A.R. 1109-10. Plaintiff also experienced some decreased sensation and tingling, which Dr. Bader
5 noted could be peroneal nerve irritation or possibly a neuroma. A.R. 1110. X-rays showed
6 degenerative changes in Plaintiff's left ankle with spur formation and decreased joint space. A.R.
7 1110. Plaintiff requested an analgesic injection for the pain. A.R. 1110. Plaintiff received more X-
8 rays on February 4, 2014, which showed no acute change in Plaintiff's left ankle or any indications
9 for removal of the hardware. A.R. 1112.

10 On April 13, 2014, Dr. Bader completed a medical assessment of Plaintiff's work-related
11 abilities. A.R. 1193-95. He wrote that Plaintiff can lift and/or carry 30 pounds. A.R. 1193.
12 However, he left blank the lines that asked how frequently Plaintiff can lift/carry that amount as
13 well as the section that asked what medical findings support that assessment. A.R. 1193. Dr. Bader
14 also stated that Plaintiff could stand 2-4 hours per day, 1 hour at a time. A.R. 1193. According to
15 Dr. Bader, Plaintiff's ability to sit is not impaired because Plaintiff's degenerative joint disease is in
16 his hips and ankles. A.R. 1194. He indicated that Plaintiff can only occasionally climb, balance,
17 stoop, crouch, kneel, and crawl because of arthritis in his hips and knee. A.R. 1194. Dr. Bader
18 stated that Plaintiff's manipulative functions were not impaired. A.R. 1194. Finally, Dr. Bader
19 opined that Plaintiff's experience of pain and functional limitations would interfere with his ability
20 to complete work-related tasks approximately 20% of the day. A.R. 1195.

21 The ALJ accorded Dr. Bader's opinion partial weight. A.R. 27. He determined that Dr.
22 Bader's assessed limitations for standing/walking and postural activities were supported by the
23 longitudinal record, including "evidence of some ongoing orthopedic pain and sensory complaints
24 following ankle and hip surgery." A.R. 27. Noting that Dr. Bader did not indicate how frequently
25 Plaintiff could lift and/or carry 30 pounds, the ALJ assessed more restrictive limitations consistent
26 with light work—namely, that Plaintiff can lift/carry 20 pounds occasionally and 10 pounds
27 frequently. A.R. 23. He also assessed more restrictive sitting limitations, finding that Plaintiff can
28 only sit for up to 6 hours in an 8-hour workday. A.R. 23. However, he rejected Dr. Bader's opinion

1 that Plaintiff's pain and functional limitations would interfere with his ability to complete work-
2 related tasks 20% of the day. A.R. 27. He wrote:

3 The objective medical record rather fails to document significant objective
4 evidence to indicate the claimant would be significantly limited in
5 completing tasks. Treatment records do not mention particular observed
6 mental or behavior abnormalities or significant medication side effect
7 complains to treating medical providers.

8 A.R. 27. Because Dr. Bader's opinion is contradicted by other medical opinions in the record that
9 do not contain a similar restriction, the ALJ was required to give specific and legitimate reasons to
10 reject that portion of the opinion. *Lester*, 81 F.3d at 830.

11 Plaintiff argues that the ALJ erred in rejecting Dr. Bader's opinion about the extent to which
12 Plaintiff's pain and function limitations would interfere with his ability to complete work tasks. Pltf.
13 Mot. at 6. He asserts that the ALJ incorrectly assumed that medication side effects and mental
14 abnormalities were the only reasons why Plaintiff would be off-task for a significant portion of the
15 workday, even though Dr. Bader's opinion clearly states that Plaintiff is restricted by his pain and
16 functional limitations instead. *Id.* According to Plaintiff, the medical record amply demonstrates
17 that Plaintiff experiences a significant amount of pain after sustained activities which would
18 manifest in the form of unscheduled rest breaks. *Id.* At 8. Thus, Plaintiff argues, the ALJ did not
19 articulate a specific and legitimate reason to reject Dr. Bader's opinion about interference with
20 Plaintiff's ability to work. Further, Plaintiff contends that the error is not harmless because the VE
21 testified that an individual who would be off-task even 10% of the workday could not perform the
22 jobs identified by the ALJ. A.R. 104.

23 Plaintiff's arguments are unconvincing. Importantly, the ALJ found that Plaintiff's self-
24 reported pain symptoms were not entirely credible. A.R. 26-27. Plaintiff does not challenge that
25 ruling on appeal. Accordingly, medical opinions may be disregarded to the extent that they rely on
26 Plaintiff's subjective pain complaints. *Tonapetyan*, 242 F.3d at 1149 (finding that the ALJ was "free
27 to disregard" a physician's opinion about subjective complaints when the record supported an
28 adverse credibility finding). Even if, as Plaintiff argues, the ALJ erred in focusing on medication
side effects and mental abnormalities rather than pain, such error is harmless because Dr. Bader's

1 opinion about Plaintiff's pain limitations is undermined by the unchallenged adverse credibility
2 finding against Plaintiff. *Tommasetti*, 533 F.3d at 1038 (an error is harmless when it is
3 inconsequential to the ultimate nondisability determination).

4 Plaintiff's authority on this point is not persuasive. *See* Reply at 4. Both cases he cites are
5 unpublished memoranda dispositions with limited analysis. *See Ogin v. Colvin*, 608 Fed.
6 App'x 519 (9th Cir. 2015); *Om v. Colvin*, 545 Fed. App'x 665 (9th Cir. 2013). *Ogin* is also
7 inapposite because in that case, the Ninth Circuit determined that the ALJ improperly discounted a
8 medical opinion when the doctor "expressly took into account" the factors underlying the adverse
9 credibility finding. *See* 608 Fed. App'x at 520. Here, by contrast, there is no indication that Dr.
10 Bader considered any of the factors cited by the ALJ in making his credibility finding. In *Om*, the
11 Ninth Circuit found that the ALJ erred in assessing the claimant's credibility and so the ALJ also
12 improperly rejected medical opinions that were based on the claimant's statements. 545 Fed.
13 App'x at 667. Here, by contrast, the court does not find that the ALJ's credibility finding was
14 erroneous since Plaintiff did not raise that issue.

15 Since the ALJ made a partially adverse credibility determination, which is not challenged
16 here, the ALJ properly rejected an opinion based on Plaintiff's subjective complaints.

17 **2. Smriti Shrestha, M.D.**

18 Dr. Smriti Shrestha is one of Plaintiff's treating physicians. Dr. Shrestha completed a
19 medical assessment of Plaintiff's work-related limitations on April 30, 2015. A.R. 1276-78. Dr.
20 Shrestha opined that Plaintiff can lift or carry 40-50 pounds from "very little" to up to one third of
21 an 8 hour workday. A.R. 1276. Dr. Shrestha also stated that Plaintiff could only stand or walk 1-2
22 hours in an 8-hour day, 14 minutes at a time, due to his lower back pain and numbness/burning in
23 his left ankle and foot. A.R. 1276. Dr. Shrestha wrote that Plaintiff's ability to sit was not affected
24 by impairment, but then also opined that Plaintiff could only sit for 3 hours total, 30 minutes at a
25 time. A.R. 1277. Dr. Shrestha stated that Plaintiff can frequently balance; occasionally climb,
26 stoop, and crouch; and rarely kneel or crawl. A.R. 1277. Dr. Shrestha opined that Plaintiff could
27 frequently reach, handle, feel, see, hear, and speak, but only occasionally push/pull due to his lower
28 back pain. A.R. 1277. According to Dr. Shrestha, Plaintiff's experience of pain and functional

1 limitations, combined with the side effects of his pain medication, would interfere with his ability
2 to complete work-related tasks more than 30% of the day. A.R. 1278.

3 The ALJ assigned partial weight to Dr. Shrestha's opinion. He found that Dr. Shrestha's
4 "general limitation on reduced standing, walking, and postural activities is consistent with the
5 claimant's history of hip and ankle surgeries and treatment notes documenting ongoing pain and
6 sensation complaints and varied gait, range of motion, and provocative signs." A.R. 28. However,
7 the ALJ went on to find that "the evidence does not support such restrictive limitations on sitting
8 and manipulative and other activities," citing a list of medical records. A.R. 28. Accordingly, the
9 ALJ assigned higher weight to the opinions of the Social Security medical consultants. A.R. 28.
10 Since Dr. Shrestha's opinion about Plaintiff's limitations is contradicted by other opinions in the
11 record, including the opinions of the Social Security medical consultants, the ALJ had to provide
12 specific and legitimate reasons to discount it.

13 Plaintiff argues that the ALJ erred in weighing Dr. Shrestha's opinion. He asserts that the
14 ALJ rejected Dr. Shrestha's standing/walking limitation of 1-2 hours per day without articulating
15 any reason at all. Pltf. Mot. at 11. Instead, he argues, the ALJ assessed an RFC that includes
16 standing/walking up to 4 hours per day without explaining why he rejected Dr. Shrestha's more
17 limited restrictions. *Id.* Similarly, Plaintiff argues that the ALJ rejected Dr. Shrestha's assessed
18 limitations as to sitting and "other activities" with a blanket statement that such limitations are not
19 supported by the evidence and a serial list of cites to the medical evidence. *Id.* at 12.

20 The court finds that the ALJ did not err in rejecting Dr. Shrestha's assessed limitations.
21 Plaintiff focuses on the narrow part of the ALJ's decision that specifically discusses Dr. Shrestha's
22 opinion, but the ALJ elsewhere reviewed the medical record at some length to find that the evidence
23 does not support a more restrictive RFC. A.R. 24-26. For example, the ALJ cited records
24 documenting mild pain, normal gait, normal muscle tone, normal sensation, and 5/5 strength. A.R.
25 24-25. In discussing other medical opinions, the ALJ wrote that the medical record shows
26 "generally normal strength, sensation, and reflexes, and no assistive device." A.R. 27. The ALJ
27 also determined that "[p]rogress notes and self-reports indicate the claimant was improving," and
28 there is no indication that Plaintiff continued to use a cane or other assistive device. A.R. 28.

1 Although the ALJ did not repeat his reasoning with respect to Dr. Shrestha's opinion specifically,
2 the decision as a whole provides a detailed analysis of the medical record and Plaintiff's limitations,
3 including his standing/walking limitations.

4 Further, the reasons offered by the ALJ are specific and legitimate. The record contains
5 numerous examinations with benign findings, including mild or controlled pain, normal muscle
6 strength and tone, normal motor function, normal or mildly antalgic gait, intact sensation, minimal
7 tenderness, and only mild degenerative changes. A.R. 573, 577, 594, 601, 604, 614, 642, 643, 651,
8 1055, 1064, 1070, 1332, 1334, 1627, 1663, 1742, 1754, 1822. The record also supports the ALJ's
9 finding that Plaintiff experienced significant improvement with physical therapy. A.R. 1906, 1911,
10 1916, 1926. Although Plaintiff objects that some of these records predate his disability onset date,
11 the findings are fairly consistent throughout the entire medical record. While Plaintiff is correct that
12 some portions of the record document more serious pain reports, these are not sufficient to find error
13 with the ALJ's evaluation since the ALJ found that Plaintiff's pain reports are not entirely credible,
14 a finding that Plaintiff did not challenge on appeal. Finally, for the reasons stated above with respect
15 to Dr. Bader's similar opinion, the ALJ did not err in rejecting Dr. Shrestha's opinion that Plaintiff
16 would experience significant pain limitations more than 30% of the workday.

17 Accordingly, the record as a whole supports the ALJ's assessment of Plaintiff's limitations
18 and the ALJ did not err in rejecting Dr. Shrestha's opinion on that point.

19 **IV. CONCLUSION**

20 For the reasons stated above, the court denies Plaintiff's motion for summary judgment and
21 grants the Commissioner's cross-motion. The Clerk shall enter judgment for the Commissioner and
22 against Plaintiff and close this case.

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25 **IT IS SO ORDERED.**

26 Dated: March 29, 2021

